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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 1182

JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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MAY IT PLEASE THE COURT:

STATEMENT OF THE MATTER INVOLVED.

Petitioner recovered a $7,500.00 jury verdict and judgment against respondent in the District Court for the Northern District of Indiana, for the death of her husband in a railroad crossing accident in Indiana.

The Circuit Court of Appeals reversed on the ground that, though defendant was guilty of negligence, the decedent was guilty of contributory negligence as a matter of law.

It was a 2 to 1 decision, with Judge Evans writing the majority opinion (R. 260), and a dissenting opinion by Chief Judge Kerner, who argues for affirmance. (R. 267.) The decision, not yet officially reported to our knowledge, is reported in *Moss* v. *Pennsylvania P. Co.*, 146 F. (2d) 673, but the advance sheet erroneously cites the date the rehearing was denied as January 26, when it was February 6. (R. 272.)

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is based on Section 8 of the Act of February 13, 1925, 43 Stat. 936, 940, 28 U. S. C. A. 350.

The judgment of reversal was entered on January 3, 1945 (R. 271), after which petitioner duly filed a petition for rehearing on January 18, 1945 (R. 271), which was answered by respondent (R. 271), and considered by the court, after which the court entered an order denying the petition on February 6, 1945. (R. 272.) This petition is being filed within three months after the judgment, deducting the period between January 18 and February 6, during which the time for this petition was suspended by the petition for rehearing, in accordance with this court's construction of the Act of February 13, 1925, in *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393.

THE QUESTIONS PRESENTED.

1. Does this decision deprive petitioner of a jury trial?

2. Does this decision conflict with applicable decisions of the Indiana Supreme Court?

REASONS FOR ALLOWANCE OF WRIT.

1. This decision deprives petitioner of a jury trial, because:

(a) The court arbitrarily substitutes its own inference in place of the jury's as to whether decedent used ordinary care under the complex circumstances of speed, distances and visual obstruction at the time of the collision. This conflicts with the rule recently announced by this court in reversing similar cases from the Seventh Circuit:

Tennant v. *Peoria and P. U. Ry. Co.* (1944), 321 U. S. 29, 35, 64 S. Ct. 409, 412.

Pokora v. *Wabash Ry. Co.* (1934), 292 U. S. 98, 101, 105, 54 S. Ct. 580, 581, 583, 78 L. Ed. 1149.

NOTE: Jury trial in this case is guaranteed by *Article I, Sec. 20, of the Indiana Constitution,* in addition to the guaranty in the Federal Constitution.

(b) This error is aggravated by the fact that the court, in arguing its own fact inference against the jury's, prints in its majority opinion two of defendant's photographs, which most effectively argue defendant's contention that the view was not obstructed (R. 262), but ignores two of plaintiff's photographs which forcefully sustain the jury's inference that the view was obstructed. (Plaintiff's Exhibits 3 and 6, printed at R. 203 and 209, offered in evidence at R. 21-22 and at R. 77-79.)

2. This decision conflicts with applicable decisions of the Indiana Supreme Court, which control the question

of contributory negligence in this railroad crossing accident which occurred in Indiana, namely:

(a) The majority opinion holds that "the simple fact" of a motorist driving in front of a train and getting hit, is enough to "establish contributory negligence as a matter of law" in Indiana, unless the motorist proves he was not negligent. (R. 261.) This conflicts directly with the Indiana statute which casts on the defendant the burden of proving contributory negligence, and conflicts with the Indiana Supreme Court decisions holding that "there is no presumption whatever that either party was or was not guilty of negligence."

Sec. 2-1025, Burns Ann. Sts. 1933.

Baltimore & Ohio R. Co. v. *Reyher* (1940), 216 Ind. 545, 549-555, 24 N. E. (2d) 284.

"It will not be presumed that decedent was guilty of contributory negligence merely because there was a collision between his truck and the locomotive."

Heiny v. *Pennsylvania R. Co.* (1942) 221 Ind. 367, 373, 47 N. E. (2d) 145.

(b) The majority opinion after much vacillation, rules as a matter of law that an Indiana motorist is guilty of contributory negligence when he approaches a railroad crossing at 10 or 15 miles per hour, with his view of the train obstructed until he gets within 20 or 30 feet of the track, and he gets hit by a train going 65 miles per hour through a town in violation of an ordinance (R. 260, 266). This conflicts with the decisions of the Indiana Supreme Court holding that it is for the jury to determine from such circumstances whether as an ultimate fact the motorist was

guilty of negligence, proximately contributing to his death. Recent controlling Indiana cases hold that such circumstances do not constitute contributory negligence as a matter of law:

Heiny, Admrx. v. *Pennsylvania R. Co.* (1942) 221 Ind. 367, 372-375, 47 N. E. (2d) 145. (Facts similar to those at bar. Held: for the jury.)

Pettibone v. *Howard* (1941) 218 Ind. 543, 546, 34 N. E. (2d) 12. (Photographs rank no higher than oral testimony and will be disregarded in favor of testimony most favorable to plaintiff. Page 546.)

Bartley v. *Chicago & E. I. Ry. Co.* (1939) 216 Ind. 512, 523-525, 24 N. E. (2d) 405. (Facts similar to those at bar. Held: for the jury.)

Baltimore & Ohio R. Co. v. *Reyher* (1939) 216 Ind. 545, 550-555, 24 N. E. (2d) 284. (Facts similar to case at bar. Held: where the physical facts, though undisputed, are susceptible of more than one inference, case is for jury on contributory negligence. Page 552.)

(c) *The dissenting opinion in the case at bar contains an able, concise and correct summary of the Indiana law and decisions on all questions presented in this petition* (R. 267).

The majority opinion, though admitting that Indiana law controls (R. 261), *does not cite a single Indiana decision. It ignores all the Indiana cases cited in the dissenting opinion,* and substitutes its own arbitrary dictum, based on involved and vacillating argument as to what constitutes contributory negligence under the circumstances at bar. It cites (at R. 261), *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98, which is directly against it, and *B. & O. R. R.* v. *Goodman*, 275 U. S. 66, which the Indiana courts have ex-

pressly refused to follow. See *Pennsylvania R. Co.* v. *Boyd* (1933), 98 Ind. App. 439, 444, 185 N. E. 160, 162. (Transfer denied by Indiana Supreme Court.)

3. Petitioner's object is not to obtain a review of Indiana law as such, but to protect two basic rights which she asserts were violated by the Circuit Court of Appeals and which can only be remedied by this Court:

(a) Trial by jury was denied petitioner. *This is apparent on the face of the majority opinion.* It attempts to argue counter-inferences of fact against the jury's inferences (R. 263-266). It criticises decedent for alleged violation of a statute and then abandons the charge and admits that the Indiana decisions do not support it (R. 265-266). It bases part of its reasoning on defendant's evidence of 44 feet of clear vision (R. 265), then shifts to plaintiff's evidence of 20 feet of vision (R. 266), and finally rests on the court's dictum of fact that "he should have looked" (R. 266).

A very slight look at the record behind the opinion will emphasize and verify this infringement of the jury's functions. The majority opinion prints two of defendant's photographs in its attempt to argue against the jury on the fact of visional obstruction (R. 262), while ignoring plaintiff's photograph taken by a police officer immediately after the accident, which strongly supports the jury (Plaintiff's Exhibit 3, printed at R. 203 and introduced in evidence at R. 21-22). Note the knoll and weeds back of the cross-arm which extend almost out to the track (R. 203). See also

Plaintiff's Exhibits 6 and 7 (printed at R. 209, 211, introduced at R. 77-79). See also defendant's own Exhibit 4, showing quite a high knoll obstructing vision until the traveler almost reaches the tracks (printed at R. 221, introduced at R. 125). While ignoring this last exhibit, the court chooses to print the next one, Defendant's Exhibit 5, which is a misleading and unfair representation because it cuts off the knoll (printed at R. 223, introduced at R. 74). The opinion also chooses to print Defendant's Exhibit 1, which is worthless on the point decided, because it does not show whether any obstruction existed to the right, from where the train was coming (printed at R. 215, introduced at R. 74). This highly partial and argumentative selection of the two photographs most favorable to the court's ~~interest~~ inference, out of a total of 9 introduced (R. 203-223), is important because the opinion offers these photographs as being an undisputed and fair representation of the physical facts and evidence which were laid before the jury, and the court repeatedly bases its argument on these two photographs (R. 263, top and bottom; R. 267, top), while admitting that the physical fact of obstruction thus argued from the photographs "is determinative of the case" (R. 264, middle). See also, positive testimony of plaintiff's witness (the police officer who investigated right after the accident) that it was "practically impossible" for a traveler in decedent's situation to see the approaching train (R. 20-21), he being the officer who took the only photograph made on the date of the accident, Plaintiff's Exhibit 3, *supra* (R. 21, 203). He further testified

that the first view decedent had was when he got about 20 feet from the track (R. 29).

This court will review negligence cases *for the purpose of preventing such infringement on the right of jury trial.* It recently reviewed and reversed the case of *Tennant* v. *Peoria & P. U. Ry. Co.* (C.C.A. 7), 134 F. (2d) 860, where the Circuit Court of Appeals for the Seventh Circuit had overturned a jury's verdict on a question of negligence and proximate cause. This court granted certiorari and restored the verdict, saying:

> "We granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation."
>
> *Tennant* v. *Peoria & P. U. Ry. Co.* (1944), 321 U. S. 29.

> Note: The above case was under the Federal Employers Liability Act, but the decision is not based on the Act. It goes entirely on the question of right to jury trial.

This court also granted certiorari and reversed the case of *Pokora* v. *Wabash Ry. Co.* (C.C.A. 7), 66 F. (2d) 166, where the Circuit Court of Appeals for the Seventh Circuit had overturned a jury verdict on contributory negligence in a railroad crossing case quite like the one at bar.

> *Pokora* v. *Wabash R. R. Co.* (1934), 292 U. S. 98, 101, 105.

(b) Further, this court will protect a litigant in the District Court of Indiana against having the Circuit Court of Appeals ignore the applicable Indiana decisions and apply its own arbitrary view of the law. *Rule 38, par. 5 (b).* If Indiana law

can be ignored and violated in this manner, as the dissenting opinion demonstrates it has been, this court's decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is nothing but a meaningless admonition to lower federal courts, to be ignored at will, and is no protection to citizens. The majority opinion, without citing a single Indiana case, or attempting to distinguish those in the dissenting opinion, *compels the District Court in the case at bar to ignore the Indiana law and to violate the rule of this court in the Tompkins case.*

In the future numerous crossing cases in the Federal District Courts in Indiana, shall those courts follow the Indiana Supreme Court as commanded in the *Tompkins* case or follow the arbitrary contrary rule announced in this majority opinion that (a) the simple fact of a traveler getting hit makes him guilty of contributory negligence as a matter of law unless he proves himself innocent (R. 261), and (2) if he has a clear view of the track for 20 feet, he is guilty of contributory negligence as a matter of law (R. 266)?

Having been advised by the Clerk that a supporting brief is optional, we believe that the reasons for granting the writ are sufficiently stated above, and in the dissenting opinion (R. 267), and therefore refrain from filing a further brief.

WHEREFORE, Petitioner prays that the writ of certiorari may issue for the review of this case.

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